(2023) 04 KL CK 0127

In the High Court Of Kerala

Case No : Bail Application No. 521 Of 2023

Niyas Kuttassery APPELLANT

Vs

State Of Kerala RESPONDENT

Date of Decision : 13-04-2023

Acts Referred:

Code of Criminal Procedure, 1973 — Section 438
Indian Penal Code, 1860 — Section 34, 120B, 406, 420
Indian Telegraph Act, 1885 — Section 4, 20
Indian Wireless Telegraphy Act, 1933 — Section 3, 6(1), 6(1A)
Information Technology Act, 2000 — Section 43(a), 43(b), 43(f), 43(g), 43(i), 65, 66, 66F(1)(B)

Citation : (2023) 04 KL CK 0127

Hon'ble Judges : Dr. Kauser Edappagath, J

Bench : Single Bench

Advocate : Susanth Shaji, Varghese C.Kuriakose, Albin A. Joseph, P.Narayanan, Sajju.S

Final Decision : Dismissed

Judgement

Dr. Kauser Edappagath, J

1. All these bail applications are filed under section 438 of the Code of Criminal Procedure seeking pre-arrest bail.

2. The applicant is accused No.5 in Crime Nos.320/2021 of Nallalam Police Station, accused No.5 in Crime Nos.539/2021, 540/2021 and 543/2021 of Kasaba Police Station and accused No.6 in Crime Nos.541/2021 and 542/2021 of Kasaba Police Station.

3. The offences alleged in all the crimes are under sections 406, 420, 120B r/w 34 of IPC, sections 4 and 20 of the Indian Telegraph Act, 1885, sections 3, 6(1), 6(1A) of Indian Wireless Telegraphy Act, 1933 and sections 65, 43(a), (b), (f), (g), (i) r/w 66, 66F (1)(B) of the Information Technology Act, 2000.

4. The prosecution case in all cases is identical. It is alleged that the applicant with criminal intention conspired with other accused persons viz., Juraiz, Shabeer, Krishnaprasad, Ibrahim Pullattil and Abdul Gafoor, had conducted illegal fraudulent activities to acquire unlawful gain by installing parallel illegal telephone exchanges at different locations at Kozhikode and converted international phone calls and other phone calls by terminating those calls and bypassed them to local calls, with the help of illegal call routing Gateway devices, by inserting pre-activated SIM cards without the knowledge or consent of the SIM owners whereby they cheated various telecom service providers in India, had accessed, tampered, altered and diminished the value of the telecommunication network, sneaked into the communication system of the country, breached the internal security and sovereignty of the nation, threatened the privacy of the citizen and threatened the country's internal security and economic stability causing huge amount of monetary loss to the Government of India and thereby committed the offences.

5. I have heard Sri.Varghese C.Kuriakose, the learned counsel for the applicant and Sri.P.Narayanan, the learned Senior Public Prosecutor.

6. The learned counsel for the applicant submitted that the applicant is innocent and has been falsely implicated in the cases. The learned counsel further submitted that no materials are on record to connect the applicant with the alleged crimes; hence, he is entitled to get bail. The learned counsel also submitted that there are no ingredients to constitute the offence under sections 406 and 420 of IPC and section 66 F(1)(B) of the IT Act in the FIR. The learned Public Prosecutor, on the other hand, submitted that the alleged incident was occurred as a part of the intentional criminal acts of the applicant, and if he is released on bail at this stage, it will affect the course of the investigation. The learned Public Prosecutor further submitted that the applicant is the prime accused in all cases who arranged the servers to function illegal exchanges and his custodial interrogation is necessary. The Public Prosecutor further submitted that the applicant is absconding, and LOC issued against him is in force. It is also submitted that considering the gravity of the cases, a request has already been made to transfer the investigation of the cases to NIA.

7. The law regarding the grant or refusal of pre-arrest bail is well settled. Pre-arrest bail cannot be granted as matter of course. The power under section 438 of Cr.P.C could be exercised only when a special case is made out, that too, recording reasons thereof. In catena of decisions, the Apex Court has held that pre-arrest bail can be granted only in exceptional circumstances where the court is prima facie of the view that the accused has falsely been roped in the crime and would not misuse his liberty. [See D.K.Ganesh Babu v. P.T.Manokaran (AIR 2007 SC 1450), State of Maharashtra v. Mohammed Sajid Husain Mohammed S.Husain (AIR 2008 SC 155), Union of India v. Padam Narain Aggarwal (AIR 2009 SC 254), Siddharam Satlingappa Mhetre v. State of Maharashtra and others (AIR 2011 SC 312) and Jai Prakash Singh v. State of Bihar and another (AIR

2012 SC 1676)]. The Apex Court in P.Chidambaram v. Directorate of Enforcement (AIR 2019 SC 4198) laid down the factors and parameters to be considered while dealing with the anticipatory bail. It was held thus:

"Ordinarily, arrest is a part of procedure of the investigation to secure not only the presence of the accused but several other purposes. Power under Section 438 Cr.PC is an extraordinary power and the same has to be exercised sparingly. The privilege of the pre-arrest bail should be granted only in exceptional cases. The judicial discretion conferred upon the court has to be properly exercised after application of mind as to the nature and gravity of the accusation; possibility of applicant fleeing justice and other factors to decide whether it is a fit case for grant of anticipatory bail. Grant of anticipatory bail to some extent interferes in the sphere of investigation of an offence and hence, the court must be circumspect while exercising such power for grant of anticipatory bail. Anticipatory bail is not to be granted as a matter of rule and it has to be granted only when the Court is convinced that exceptional circumstances exist to resort to that extraordinary remedy."

8. The case records show that the accused installed six parallel illegal telephone exchanges at different locations in Kozhikode. It has come out during the investigation that the applicant has an active role related to the installation and functioning of illegal exchanges. He supplied cloud servers to the other accused to install the illegal exchange. During the investigation, a diary seized from the office of the firm 'Links IT Solutions', owned by the accused No.2, showed the applicant's name and an IP number adjacent to his name. The said IP number was also detected from the SIM boxes by the CDAC officials while examination. The origin of this IP number was investigated, and it was revealed that an Aurangabad-based firm M/s Intellectica Systems Pvt. Ltd., who used to rent virtual and dedicated servers for clients, had given a server in the aforesaid IP number to the applicant. Subsequently, a notice under section 91 of Cr. P.C. was served to the company, and it was revealed that they had given several server spaces to the applicant on a rental basis. The servers were actively found to be maintained by the applicant by giving monthly rent. The virtual servers managed by the applicant and used for the functioning of the illegal exchanges were detected, seized, and extracted during the investigation. The applicant's Pay Pal payment wallet account was also seized, which showed that he had done a huge transaction of Rs.38,56,818.12 in recent years as the rent of the servers he maintained. The investigating agency requested the department of telecom to inspect the seized articles. After inspection, the telecom authority issued certificates clarifying that using this type of equipment in this manner bypasses the licensed International Long Distance Operator (for short, 'ILDO') Gateways and is illegal. Further, it was clarified that this set-up caused a loss of revenue to the licensed ILDO, and the Government of India has also lost a one-time entry fee of Rs.2.5 crores towards the ILDO license in each case. It was also asserted that this set-up poses a security threat to the nation as the calls switched through this set-up cannot be traced and are beyond the scope of lawful

interception.

9. The servers involved in the functioning of the illegal exchanges were detected and extracted as per the Magistrate Court’s permission during the investigation. Among them, one server in IP No.185.189.124.149, allegedly maintained and managed by the applicant, was analysed. The counsel for the applicant relying on the IP lookup result submitted that it was not maintained and managed by the applicant. However, according to the prosecution, during the investigation, it was found that it was maintained and managed by the applicant. On analysing the said server data, it was revealed that the applicant maintained 582 call routes and connected 110 voice applications. Among the call routes sold were to countries like Syria, Yemen, Jordan, Palestine, Pakistan, Afghanistan, Nigeria and Turkey. Annexure X1 produced by the respondent is the printouts of the initial six pages of a 396-page table and a consolidated list of money trials containing the details of the payment found during the extraction of the servers maintained by the applicant. On analysis of the consolidated data, it was revealed that the applicant had conducted an overall transaction equivalent to Indian Rupees 46,23,41,544/- through the currencies of different countries like the United States of America, Pakistan, Bangladesh, Oman, UAE and Saudi Arabia. From the aforesaid amount, Rs 10,52,19,523/-was found to be circulated directly among the accused and various other individuals connected with the parallel exchange installation. According to the investigation agency, these data show that the applicant controlled and acted as a hub of many Hawala money transactions among those who operated illegal exchanges. Of course, since it affects the country’s economy, it needs to be probed into in detail.

10. No doubt, the investigation conducted so far reveals that the applicant and the remaining accused had violated the nation's existing law by permitting communication through their illegal parallel telephone exchanges. The SIM cards used in the SIM boxes by the accused in these parallel installations were procured from different States. It is revealed from the investigation that fake documents were provided to the service providers to acquire the same. Those SIM cards were obtained without the knowledge or consent of the SIM owners. By operating the parallel telephone exchange using GSM Gateway devices, soft switches, preactivated SIM cards etc., the accused obtained access to call data records of the clients, which is restricted data for the security and privacy of the citizens. Access to call data records of the subscribers by the accused is against the public interest and public safety. Such CDRs were found in huge volumes in the applicant's data server. Vast volumes of CDRs were found in the server and call routes maintained by the applicant. According to the investigating agency, by lending these call routes, the applicant allowed China Skyline company to access Indian Telecommunication beyond the scope of interception, which is against the interest of national security. An illegal exchange functions by pushing communication to the country, bypassing the highly secured International Long-Distance Gateways without being noticed by the security system of our country.

These facts and circumstances show that the accusation made against the applicant is very serious in nature and it prima facie shows a premeditated criminal act on his part. The investigation of the case is halfway. The LOC issued against the applicant is still in force. According to the investigating agency, it is essential to find the missing Gateway devices (SIM boxes) and material objects, including his laptops and mobile phones, which are exclusively in his knowledge. The passwords of the Skype account and his Pay Pal wallet is essential to find out his monetary transaction. The source of his huge income is also to be verified in detail. For all these purposes, his custodial interrogation is necessary. As rightly argued by the learned Public Prosecutor, the possibility of the applicant influencing the witnesses and interfering with the investigation cannot be ruled out if he is released on bail. Considering the gravity of the offence and stage of the investigation, it is not a fit case where extra ordinary jurisdiction vested with this Court u/s 438 of Cr.P.C. could be invoked. The bail applications are accordingly, dismissed.